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No. 74-100

# In the Supreme Court of the United States

OCTOBER TERM, 1974

ROY D. GARNER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals panel (App., *infra*) [1] and the opinion of the court of appeals *en banc* (Pet. App. A) are reported at 501 F. 2d 228.

### JURISDICTION

The judgment of the court of appeals *en banc* was entered on April 11, 1974. A petition for rehearing was denied on June 11, 1974. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to August 9, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "App." refers to the appendix to this brief.

## QUESTIONS PRESENTED

1. Whether the admission into evidence of petitioner's federal income tax returns at his trial for non-tax-related gambling offenses violated petitioner's privilege against self-incrimination, although he did not assert any privilege when he filed the returns.

2. Whether errors were committed regarding the admission of evidence and whether the government should have been estopped to call as a witness one of petitioner's co-conspirators.

## STATEMENT

After a jury trial[2] in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to violate 18 U.S.C. 224 (bribery in sporting contests), 1084 (interstate transmission of bets or wagers), and 1952 (use of an interstate facility to distribute proceeds of unlawful activity), in violation of 18 U.S.C. 371.[3] Petitioner was sentenced to two years' imprisonment, subject to the

[2] This was petitioner's second trial. At the first trial, petitioner and co-defendant Clarence Swank were convicted of conspiracy; Swank was also convicted of transmitting wagers in interstate commerce in violation of 18 U.S.C. 1084, but the jury was unable to reach a verdict on the charge that petitioner aided and abetted that offense. Co-defendant Wayne Donaway was convicted of violations of 18 U.S.C. 1084 and 1952. The trial court set aside petitioner's conviction and granted him a new trial on the ground that the prosecutor had improperly commented on petitioner's failure to testify.

[3] Petitioner was also retried (Count Two) for aiding and abetting Clarence Swank in the interstate transmission of bets and wagers, but, at the close of the government's case, petitioner was acquitted by the court on that charge.



immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2).[4] On appeal, a panel of the court of appeals reversed the conviction, one judge dissenting (App., *infra*). Following a rehearing *en banc*,[5] the court affirmed the conviction, five judges dissenting (Pet. App. A).

The facts are undisputed. The jury convicted petitioner on the first count of the indictment, which charged that petitioner, Clarence Swank, William Lawler (an unindicted co-conspirator), and others conspired to violate the above-mentioned gambling laws. The object of the conspiracy, as charged in the indictment (Clerk's Record 183–184), was as follows:

> [D]efendants and their unindicted co-conspirators would arrange to fix horse races, by means of bribery, injecting stimulants in horses, and

[4] After the second conviction, petitioner was released on bond pending appeal. Thereafter, bond was revoked after petitioner was found in possession of a suitcase containing paraphernalia and drugs of a type used to stimulate and depress race horses. The court of appeals affirmed the bond revocation, and this Court denied certiorari to review that action, 416 U.S. 935, after the government indicated that it would not move for petitioner's confinement unless and until the court *en banc* affirmed the conviction. Although the conviction has now been affirmed, the government so far has not sought petitioner's confinement, and he remains free on bond.

[5] On September 11, 1972, an order was filed denying the government's petition for rehearing and rejecting the suggestion for rehearing *en banc*, stating that no judge had requested a vote. In fact, however, one judge had requested a vote. When this error was called to the clerk's attention, the mandate was withheld pending the vote, and on December 13, 1972, a majority granted rehearing *en banc*. Petitioner sought a writ of mandamus or prohibition from this Court to prevent the rehearing, but the application was denied, 411 U.S. 963.

> other means, and would secure information regarding particular horses and jockeys from sources unavailable to the general public. Based upon these arrangements and this information, defendants would attempt to place and [would] place wagers on particular horses. In order to maintain high pari-mutual odds, and in order to avoid others not a party to the conspiracy placing wagers on the same horses, wagers were placed with bookmakers, away from the track, shortly before the starting time of the race in which the particular horse was running.

Petitioner's role in the conspiracy was to supply information to co-conspirators Lawler and Swank, who would place bets on the selected horses. The indictment did not charge, and the government did not attempt to prove, that petitioner himself had placed any bets on any of the races involved in the conspiracy.

The evidence adduced against petitioner included the testimony of co-conspirators Lawler and Swank and that of Emory Long, trainer of one of the horses on which Lawler and Swank bet pursuant to the conspiracy. In addition, the government introduced charts of various horses, indicating the name of the horse, the dates and results of his races, and the names of the owner, trainer, or jockey involved; telephone toll records, which revealed in detail the workings of the betting arrangements; and petitioner's federal income tax returns for the years 1965 through 1967, on which



petitioner had reported gambling as the source of most of his income.[6]

## ARGUMENT

1. a. We rely on the opinion of the court of appeals *en banc* (Pet. App. A 1–9) to support our position that the admission of the tax returns did not violate petitioner's privilege against self-incrimination because petitioner did not claim the privilege when he filed the returns.[7] The court stated, in pertinent part (Pet. App. A 7–9):

> The questions asked on the tax return were completely neutral; only Garner knew a response might be incriminating. As to all taxpayers in general, there was "compulsion" to provide the government with the information ~~cally, there was "compulsion" *to incriminate.* it was entitled to~~ demand. As to Garner specifi- But because Garner knew his answers might be incriminating, he had a choice either of claim-

[6] This evidence consisted of petitioner's federal income tax returns, Form 1040, on which he had indicated the following: on the 1965 return, petitioner listed his occupation as being that of a "professional gambler," declaring $8,022 as miscellaneous income derived from "gambling"; on the 1966 return, petitioner declared $22,000 as "wagering" income; and on the 1967 return, he declared $25,400 as "wagering" income. (See Clerk's Record 67).

[7] We do not address here the question whether the result reached by the court of appeals might alternatively be supported on the ground that federal income tax returns are required records to which the privilege against self-incrimination does not attach at all, either at the time of filing or at a subsequent criminal trial. See *Pauldino* v. *United States*, 500 F. 2d 1369, 1370–1371 (C.A. 10). Cf. *California* v. *Byers*, 402 U.S. 424; *Shapiro* v. *United States*, 335 U.S. 1; *United States* v. *Silverman*, 449 F. 2d 1341, 1345–1346 (C.A. 2), certiorari denied, 405 U.S. 918.

ing his privilege or declining to do so and answering the questions. Had Garner chosen to claim his privilege on the tax return, the government would ultimately have had to decide whether it was willing to grant him immunity in order to obtain the answer [footnote omitted]. But the granting of immunity must be in the hands of the government, not in the hands of taxpayers who provide incriminating answers rather than assert their privilege [footnote omitted].

Accepting appellant's contention would provide us with an unpalatable result. We have held that a taxpayer must assert his privilege against self-incrimination in his return in response to a specific question. Just as he had no right to be immune from questioning, likewise he is not free to immunize himself from prosecution by volunteering information to the government. To hold otherwise would allow any witness in any proceeding the later protection of the Fifth Amendment to frustrate the use of information derived from earlier testimony when the witness failed to invoke his privilege. If this were the law, immunity from use of incriminating information might well be achieved without government approval by merely including it in a tax return. Such a decision would "embark us on uncharted and treacherous seas." *Byers, supra,* 402 U.S. at 458 (Harlan, J., concurring).[8]

[8] (Footnote in original renumbered.) If Congress feels that this decision might jeopardize revenue collection, it might provide use immunity for information contained in tax returns. However, we do not feel that a judicial decision is the appropriate method for altering the compex and interrelated tax



An equally disquieting result of an acceptance of appellant's contention would be the difficulty in defining the outer perimeters. If a privilege can be asserted at a later date for information contained in a tax return, could not every subpoenaed witness in court make the same claim? Would not every response to an inquiry, originating at any level of government from census taker to property tax questioner, repose a right in the respondent to later shield those answers? This "would be an extreme if not an extravagant application of the Fifth Amendment * * *." *Sullivan, supra,* at 263–64.

We have stated that Garner failed to assert his privilege. Others might construe this as an implied waiver of its protection. That characterization overlooks the fact that the Fifth Amendment does not automatically cloak our every utterance in the fabric of its rubric. We must invoke and assert its benefits. "It is important to reiterate that the Fifth Amendment privilege is a *personal* privilege: it adheres basically to the person, not to information that may incriminate him." *Couch* v. *United States,* 409 U.S. 322, 328 (1973). Essentially, the question is whether in this situation the Fifth Amendment is a right which can be invoked retrospectively or whether it is a privilege which must be claimed when the incriminating information is requested. Here, we hold

systems of this country. *See* Byers, *supra*, 402 U.S. at 442–43 (Harlan, J., concurring); Marchetti, *supra*, 390 U.S. at 59–60; 86 Harv. L. Rev. 914, 919 n. 25 (1973). [Therefore, petitioner's concern (Pet. 17) that this decision will hinder the collection of taxes is addressed to the wrong branch of government.]

> it to be a privilege which Garner should have asserted in his tax return. Having failed to do so, he may not claim its benefit during his trial. [Emphasis in original.]

Apart from the superseded decision of the original panel below, there is no judicial authority supporting petitioner's contention. Other courts that have considered the claim have agreed with the result of the *en banc* majority. See *Pauldino* v. *United States,* 500 F. 2d 1369, 1370–1371 (C.A. 10); *Grimes* v. *United States,* 379 F. 2d 791, 796 (C.A. 5), certiorari denied, 389 U.S. 846; see also *United States* v. *Kordel,* 397 U.S. 1, 10; *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U.S. 103, 113.

b. In any event, we submit that the present case is not an appropriate vehicle for deciding the issue because any error involved in the use of the tax returns would have been harmless beyond a reasonable doubt. *Milton* v. *Wainwright,* 407 U.S. 371; *Harrington* v. *California,* 395 U.S. 250; *Chapman* v. *California,* 386 U.S. 18. As Judge Wallace pointed out in his dissent from the original panel opinion (see App., *infra,* p. 8A) "ample evidence other than the tax returns to demonstrate [petitioner's] gambling proclivities [was] provided by co-conspirators William Lawler and Clarence Swank and witness Emory Long."

c. Resolution of the issue now by this Court would be inappropriate for the further reason that there is pending in Congress legislation dealing with the use of tax returns in criminal prosecutions. See, *e.g.,* S. 3982 and H.R. 16602, each introduced September 11,



1974, 120 Cong. Rec. S16306, H9183 (daily ed., September 11, 1974) (providing for access to tax returns solely for purposes of administration of the Internal Revenue laws). Thus, Congressional action may resolve many of these issues or, at least, aid the Court's eventual consideration of them.

2. Petitioner raises and discusses summarily (Pet. 3–4, 18–19) three contentions that the court of appeals panel rejected without discussion.

The introduction of telephone toll records into evidence is not prohibited by 47 U.S.C. 605. See *United States* v. *Covello,* 410 F. 2d 536, 541–542 (C.A. 2), certiorari denied, 396 U.S. 879. Moreover, the first clause of the statute permits disclosure of both the existence and the contents of a wire communication "in response to a subpoena issued by a court of competent jurisdiction * * *." Here the telephone records were obtained pursuant to subpoena.[9]

The Daily Racing Form was properly admitted to prove the races had been run. Leonard Foote, chief law enforcement officer for the California Racing Board, testified that the Daily Racing Form is the official chart book for the Racing Board and is kept in the normal course of business by the Racing Board (Transcript of Trial 256, 262).

Finally, petitioner contends that the government was estopped to call co-conspirator Swank as a witness because it opposed the severance of Swank at the

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[9] The attorney who tried the case for the government has informed us that the telephone records were obtained pursuant to subpoena for use before the grand jury which indicted petitioner and they were retained for use during trial.

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first trial and thus made him unavailable as a witness at that time. Petitioner does not allege that the prosecution acted in bad faith in opposing the motion for a severance, and there was no inconsistency between that action and calling Swank as a witness in the second trial. Moreover, petitioner does not explain how Swank would have exculpated him at the first trial although he failed to do so at the second trial. These issues are discussed in greater detail in our brief in the court of appeals, pages 17–30, 33–35, and 41, respectively.[10]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1975.

[10] Petitioner raises but does not discuss four other issues (Pet. 3–4). These were rejected without discussion by the panel of the court of appeals, and are discussed in our court of appeals brief at pages 42–48, 49–51, 52–55, and 55–58, respectively. A copy of that brief is being lodged with the Clerk of this Court.



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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

ROY D. GARNER,
*Plaintiff-Appellant,*
vs.
UNITED STATES OF AMERICA,
*Defendant-Appellee.*
No

[June 5, 1972]

Appeal from the United States District Court for the Central District of California

Before: KOELSCH and HUFSTEDLER, Circuit Judges, and WALLACE,* District Judge.

KOELSCH, Circuit Judge.

Appellant Garner appeals from the judgment convicting him of conspiring to violate federal gambling statutes.

To prove that appellant was engaged in the "business of betting and wagering," an essential element of the conspiracy as charged, the Government offered into evidence appellant's federal income tax returns for the years 1965 through 1967, on which appellant had reported gambling as the source of most of his income. The returns were admitted over appellant's objection.

In 1927, the Supreme Court held in *United States v. Sullivan*, 274 U.S. 259 (1927), that a person could not refuse to file a federal income tax return on the ground that certain disclosures in the return would tend to incriminate him. The Court, per Mr. Justice Holmes, said: "It would be an extreme if not extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had

*Honorable J. Clifford Wallace, United States District Judge, San Diego, California, sitting by designation.

been made in crime." 274 U.S. at 263-264. The Court did suggest that a taxpayer might refuse to answer certain questions on the return which might incriminate him, but that he could not refuse to file any return at all, because, "[m]ost of the items [on the return] warranted no complaint." 274 U.S. at 263.

What *Sullivan* left open, and what no Supreme Court case has yet decided, is this question: to what extent and under what circumstances may incriminating information supplied by a taxpayer in an income tax return be used against the taxpayer in a criminal prosecution unrelated to the income tax laws?

First, it must be pointed out that recent Supreme Court decisions dealing with the right of persons to refuse to file reports with the Government, when such reports would have the "direct and unmistakable consequence of incriminating [the person reporting] . . ." [*Marchetti v. United States*, 390 U.S. 39, 49 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968); *Leary v. United States*, 395 U.S. 6 (1969); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 1965)], do not apply to the requirement of filing income tax returns. Those cases dealt with statutes which were designed to elicit information about specific activities from a specific group of individuals who were "inherently suspect of criminal activities," *Albertson, supra*, 382 U.S. at 79, such as possessors of unlawful firearms, persons engaged in unlawful wagering activities, communists, and persons dealing in certain unlawful drugs. In each case, the activity required to be reported was "an area permeated with criminal statutes," *Marchetti, supra*, 390 U.S. at 47. Each case distinguished, and asserted the continuing vitality of, *Sullivan, supra*, on the ground that the questions on an income tax return are not inherently directed at the detection of criminal activity, but are instead directed at the general public and are "neutral on their face." *Albertson, supra*, 382 U.S. at 79; *Grosso, supra*, 390 U.S. at 73 (Brennan, J. concurring). See *California v. Byers*, 402 U.S. 424, 431 (1971).

However, this does not end the inquiry. It is merely the point of departure, for appellant in this case did not refuse to file an income tax return. Rather, he filed his returns as required by the Internal Revenue Code and, as far as the record shows, disclosed accurately both the amount and source of all his taxable income



for the years involved. He revealed the principal source of such income—gambling. This disclosure, the Government insists, may be used to prove an essential element of violation of the federal gambling laws.

The Government relies upon this court's decision in *Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949) for the proposition that income tax returns may be used as evidence in non-tax-related criminal proceedings. In that case we rejected the Fifth Amendment objections of the defendant, who was charged with violations of the wartime Emergency Price Control Act, and whose income tax returns were admitted to prove the amounts of income defendant unlawfully earned; relying solely[1] on the reasoning of the Fifth Circuit in *Shushan v. United States*, 117 F.2d 110 (5th Cir. 1941), cert. denied, 313 U.S. 574, reh. denied, 314 U.S. 706, we said:

> "The income tax returns were voluntarily executed by appellants under oath. They were not made in compliance with a subpoena or court order, nor were they made under the threat of prosecution or induced by any from of compulsion save that reflected in the duty of every person to report all forms of taxable income in the manner prescribed by our Internal Revenue Laws.
>
> If appellants believed that certain declarations in their tax returns might incriminate them they could have refrained from making the voluntary tax declarations here in evidence. However, they chose to report the illicit income rather than risk possible prosecution for making false or incomplete returns covering such income. The disclosures upon the tax returns must therefore be deemed to have been voluntarily entered upon a public record." 177 F.2d at 617-618.[2]

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[1]We noted a number of opinions in which appellate courts had approved the admission of such evidence, but acknowledged that in none was there "any discussion by the courts regarding the constitutional privilege." 177 F.2d at 617.

[2]In Grimes v. United States, 379 F.2d 791 (5th Cir. 1967) cert. denied, 389 U.S. 846, the Fifth Circuit continued to follow this approach. The court there said: "Assuming, without deciding, that the law required Grimes to truthfully state his occupation on the [tax] return, that a false statement would subject him to criminal penalty, and that he was thus

The passage quoted above makes it clear that in *Stillman* we applied a concept of "implied waiver" to the defendant's disclosure of self-incriminatory information on his income tax return. But, in view of recent constitutional developments, this concept has no place where the issue involves the assertion of a constitutional right and, consequently, we believe that the Supreme Court has eliminated the doctrinal keystone of the *Stillman* decision. *Marchetti v. United States*, 390 U.S. 39, 51 (1968).

All the decisions involving the question of compelled disclosures to government since *Sullivan* have consistently noted that there does exist a constitutional privilege to object to the disclosure of information which is self-incriminatory. In *California v. Byers, supra*, Mr. Justice Harlan carefully distinguished between requiring a person to report information crucial to fulfilling the "noncriminal governmental purpose of securing the information . . ." 402 U.S. at 458 (Harlan, J., concurring), and information from which criminal behavior could or would be proved: "I do not minimize the aid given the State of California by virtue of the requirement to stop and identify oneself [at an automobile accident]. But this requirement is essential to the State's nonprosecutorial goal; and, the stop having been once coerced, virtually all information secured after the stop is likely to be tainted for the purposes of exclusion under the Fifth Amendment in any subsequent prosecution." 402 U.S. at 458, n. 10 (Harlan, J., concurring). In *Byers* the issue was whether a report of an accident must be made at all, not whether individual responses in a report, if filed, could be used as criminal evidence.

forced to report as he did, he nevertheless had the right to claim self-incrimination at that time. Not claiming it then, his statement amounted to a voluntary admission which we hold could be used in this [gambling] prosecution." 379 F.2d at 796. Cf. U.S. v. Zizzo, 338 F.2d 577 (7th Cir. 1964), cert. denied, 381 U.S. 915, reh. denied, 384 U.S. 982, relied upon by the Grimes court. *Zizzo* relied on the Supreme Court's statement in Lewis v. United States, 348 U.S. 419, 422 (1955) that: "If petitioner desires to engage in an unlawful business, he does so only on his own volition. The fact that he may elect to pay the [wagering] tax and make the disclosures required by the Act is a matter of his choice. There is nothing compulsory about it, and consequently, there is nothing violative of the Fifth Amendment." In *Marchetti, supra*, the Court overruled Lewis on this point, leaving *Grimes* and *Zizzo* as dubious authority on the waiver question.



While it is true that the California court in *Byers* had held that such reports could be required only if a use restriction were put on the information contained therein, the Supreme Court's reversal of the California court was on the basic question of whether the filing of *any* such report would be self-incriminating. The California court held that filing alone was incriminating under the *Marchetti* line of cases; the Supreme Court held that it was not, because the primary purpose of requiring the report was not to collect information about inherently criminal behavior. However, under this analysis, the question of the use of compelled disclosures in unrelated criminal proceedings was not at issue. Neither was the question of whether a criminal prosecution could be based upon a refusal, unaccompanied by a claim of privilege, to give inculpatory information.[3]

It is our opinion, then, that the admissibility of appellant's disclosures here must be determined by an examination of the context in which they were made. First is the question of whether the disclosures were compelled. We are clear that the answer is yes. 26 U.S.C. §7203 makes it a crime to fail to file any return, pay any tax, or supply any information. 26 U.S.C. §7206 likewise makes it a crime for a person to make and subscribe any return "which he does not believe to be true and correct in every material matter. . . ."[4] For the Internal Revenue Service to correctly evaluate a taxpayer's claim of particular expenses, deductions, and losses, the Service must of course be provided with information showing whether or not the taxpayer qualifies. This is especially true where the taxpayer's occupation brings into

[3]On this point, Mr. Justice Brennan remarked, "[C]ertainly I would expect this Court to hesitate before affirming the conviction of a fugitive from justice for filing a tax return which omitted his address." Byers v. California, supra, 402 U.S. at 472 (Brennan, J., dissenting). In Marchetti v. United States, supra, the Court overruled United States v. Kahriger, 345 U.S. 22 (1953) and Lewis v. United States, 348 U.S. 419 (1955), which had held that a gambler's failure to raise his Fifth Amendment objection at the time filing of the wagering tax form was required constituted a waiver of his right to assert the privilege. 390 U.S. at 51-52.

[4]In United States v. Knox, 396 U.S. 77 (1969) the Court recognized that the filing and truthful filing requirements of the Internal Revenue laws might constitute compulsion, but that this compulsion would not constitute a defense to a prosecution for the falsification of the information required to be reported.

play special provisions of the tax laws and regulations. For example, a person whose income is derived from wagering may deduct his wagering losses only to the extent of his winnings from wagering, 26 U.S.C. §165(d). Gambling losses may not be carried back or carried over [See 5 MERTENS, Law of Federal Income Taxation §28.85], and a gambler whose losses offset his winnings must nevertheless report all winnings as gross income and losses as deductions. *McClanahan v. United States*, 292 F.2d 630, 631 (5th Cir. 1961), cert. denied, 368 U.S. 913. Disclosure in the tax return of a gambler's source of income is thus essential. If a gambler fails to provide this information, he subjects himself to a criminal prosecution for tax evasion or perjury; his "choice" to disclose is thus a Hobson's choice.

Nor can we automatically conclude that submitting to the statutory compulsion constitutes waiver of the right to object to the use of the incriminatory disclosure. The "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights, and . . . we 'do not presume acquiescence in the loss of fundamental rights'." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). It would be "artificial, if not disingenuous," *Byers, supra*, 402 U.S. at 442 (Harlan, J., concurring), to distinguish this principle by assuming a waiver of appellant's Fifth Amendment rights in this case merely because he disclosed the source of his income truthfully under the statutory compulsion to truthfully state all material tax information on his return. It is one thing to say that government can compel a person to make disclosures which are deemed necessary for government to adequately administer a program such as the revenue collection system.[5] It is entirely another matter, however, to then disregard the fact that the disclosure was forced and to say that, since the original purpose of compelling disclosure was not inherently hazardous to an individual's rights, any subsequent use of that compelled information is the use of "volunteered" information and therefore

[5]It was on this basis that the Court in California v. Byers, supra, held that a person could be compelled to disclose his presence at the scene of an automobile accident.



constitutionally inoffensive.[6] Such a formulation makes the government's need for the information, rather than the individual's relinquishment of a known right, the controlling factor in the waiver determination, and would allow comprehensive schemes of self-reporting in non-criminal areas to become data banks containing numerous "admissions" of criminal activity, available without limitation to prosecuting authorities. To consider information supplied to the government under such circumstances as voluntarily supplied would ". . . ultimately license widespread erosion of the privilege through 'ingeniously drawn legislation'." *Marchetti, supra*, 390 U.S. at 51.

Although the reporting of incriminatory information on income tax returns would not perhaps have the direct and immediate effect of incriminating a taxpayer, as did the reporting of such information on returns required only of those engaged in criminal activities, we are not persuaded that such information must be the first "link in the chain" of incriminatory evidence to be objectionable. Nor are we persuaded that appellant's right to object to making this disclosure in the first instance—recognized ever since *Sullivan, supra*—was lost by appellant's submitting to the statutory requirement of reporting. We cannot sanction waivers of constitutional rights "without the most deliberate examination of the circumstances surrounding them . . ." *Mar-*

[6]"[D]ifferent considerations apply when the question is not whether information may be compelled but rather to what uses compelled information may be put. Once the return has been filed, prosecution under state [or federal, it would follow] gambling laws can take place only if the State can demonstrate that its evidence is not tainted by information derived from the incriminatory aspects of the return. Since disclosure once made may never be completely undone, this burden must be borne by the State regardless of what additional restrictions are imposed upon use of the return. Accordingly, the considerations that led us to decline the imposition of use restrictions for the future in *Marchetti* and *Grosso* are not compelling in situations where the incriminating information has already been disclosed." Mackey v. United States, 401 U.S. 667, 712-713 (1971) (Brennan, J., concurring).

Mr. Justice Brennan's discussion of the "taint" on compelled disclosures would not appear to be restricted to those disclosures made under a reporting requirement directed solely at illegal activities. And in California v. Byers, supra, Mr. Justice Harlan made the same observation about the taint on disclosures compelled under a scheme which the Court held was not directed solely at criminal behavior. 402 U.S. at 458, n. 10 (Harlan, J., concurring).

*chetti, supra,* 390 U.S. at 51.[7] This record contains no fact tending to establish that appellant was aware of his right to object and thus the conclusion is impermissible that his declarations were "voluntarily entered upon a public record." *Stillman, supra.* The admission of the returns was thus error and, obviously, the information in them was highly prejudicial.

None of appellant's remaining contentions has merit or is of sufficient substance to warrant discussion.

The judgment is reversed.

WALLACE, District Judge (Dissenting):

I respectfully dissent.

I

The majority reaches a constitutional issue which is not necessary for a proper disposition of this appeal. *Ashwander v. TVA,* 297 U.S. 288, 341, 347 (1936) (Brandeis, J., concurring). Assuming, *arguendo,* that the admission of appellant's tax returns violated the Fifth Amendment privilege against self-incrimination, any error was harmless for two reasons. Fed.R.Crim.P. 52. See *Chapman v. California,* 386 U.S. 18, 22 (1967).

First, there was ample evidence other than the tax returns to demonstrate appellant's gambling proclivities provided by co-conspirators William Lawler and Clarence Swank and witness Emery Long.

Second, and more important, the jury found appellant guilty as charged in Count One of the indictment. Count One did not charge Garner with a substantive gambling or betting violation contrary to federal law, but rather with a conspiracy to violate one or more of the following statutes: 18 U.S.C. § 1084 (interstate transmission of bets or wagers by one in the business of

[7]See, e.g., United States v. Cerone, 452 F.2d 274 (7th Cir. 1971). In that case, the Seventh Circuit held admissible in a criminal proceeding the defendant's testimony in an earlier lawsuit. The court found that since defendant had been advised in the earlier proceeding of his Fifth Amendment privilege and had nonetheless agreed to testify, he had waived his Fifth Amendment privilege with respect to the subsequent use of his testimony. 452 F.2d at 291.



betting or wagering), 18 U.S.C. § 1952 (use of an interstate facility to distribute proceeds of unlawful activity), and 18 U.S.C. § 224 (bribery in sporting contests). The gist of the government's evidence and argument was that co-conspirators Lawler and Swank were elaborately betting on selected horses on the basis of information supplied by appellant. In other words, appellant's gambling tendencies were irrelevant to his part in this particular conspiracy; and, as appellant's attorney correctly argued, there was no testimony proving that Garner had placed any bets on any of the races selected as evidence of the conspiracy. Consequently, the majority errs in assuming that proof of appellant's business of betting and wagering was an essential element of the conspiracy charged. Count Two of the indictment had charged Garner with a substantive violation of § 1084, which would have required proof of a "business of betting and wagering" as an essential element; but appellant's Motion for a Judgment of Acquittal as to Count Two was granted at the end of the government's case.

Consequently, the admission of the tax returns was, at the worst, harmless because Garner's alleged role in the conspiracy was that of an information source, a role that need not be filled by one in the "business."

II

More fundamental than the fact that the alleged error was harmless is the constitutional fact that there was no error at all.

The majority holds, and I agree, that the rule of *United States v. Sullivan,* 274 U.S. 259 (1927), requires all citizens to file income tax returns despite the obvious hazards of self-incrimination. The majority makes a proper application of this rule to require disclosure of the sources of a taxpayer's income.[1] The majority then holds, and I disagree, that the appellant's Fifth Amendment privilege prevents the use of volunteered answers as evidence in this non-tax prosecution.

Without an en banc determination [see *Upton v. Commissioner,* 283 F.2d 716, 723 (9th Cir. 1960)], the majority overrules

[1]The case before us falls squarely within *Sullivan* as defined by *Albertson v. SACB,* 382 U.S. 70, 79 (1965). Clearly the request for sources of income is neutral on its face and directed to the public at large.

*Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949), which held to the contrary, contending that *Stillman* relied upon a concept of "implied waiver", the theoretical basis of which was repudiated in *Marchetti v. United States*, 390 U.S. 39 (1968). It is unclear to me that *Marchetti* so held. That case dealt with an interrelated statutory system for taxing wagers and itself distinguished *Sullivan*. 390 U.S. at 50-51. *Marchetti* rejected the implied waiver theory only to the extent of the circumstances presented by that case.[2] Therefore, the doctrine is still viable in a *Sullivan*-type situation. Pursuant to *Sullivan*, any claim of Fifth Amendment privilege must be asserted when the income tax return is filed, not at the time of a subsequent prosecution.[3] "[T]o honor the claim of privilege not asserted at the time the return was due would make the taxpayer rather than a tribunal the final arbiter of the merits of the claim." *Albertson v. SACB*, 382 U.S. 70, 79 (1965).

That the facts of this case (reporting source of income in response to a neutral question) are similar to those of *Sullivan* (reporting amount of income in response to a neutral question) and not to *Marchetti* (an interrelated statutory system to tax wagers) seems abundantly clear. Further, *Sullivan* did not leave open, as contended by the majority, whether information gained through the tax return, similar to the facts secured here, may be blocked from evidence in a subsequent non-tax prosecution. If, as stated in *Sullivan*, the privilege must be asserted at the time the return is filed, there is a waiver after the filing.[4]

Further, I do not find support for the majority opinion in the most recent pronouncement in this area by the Supreme Court. *California v. Byers*, 402 U.S. 424 (1971). Byers asserted a viola-

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[2]*See* 390 U.S. at 48-49, 50-51.

[3]"But if the defendant desired to test that *or any other point he should have tested it in the return* so that it could be passed upon." 274 U.S. at 264 (emphasis supplied).

[4]*See Heligman v. United States*, 407 F.2d 448, 450-51 (8th Cir.), *cert. denied*, 395 U.S. 977 (1969); *Grimes v. United States*, 379 F.2d 791 (5th Cir.), *cert. denied* 389 U.S. 846 (1967); *Stillman v. United States*, 177 F.2d 607, 618 (9th Cir. 1949) (which the majority overrules); *Shushan v. United States*, 117 F.2d 110 (5th Cir.), *cert. denied* 313 U.S. 574 (1941).



tion of his Fifth Amendment rights when he was charged with leaving the scene of an automobile accident, without furnishing his name and other information as required by a California statute.[5] The California Supreme Court found the statute did not violate the Fifth Amendment *only* if the required disclosures and the fruits thereof could not be used in a subsequent criminal proceeding arising out of the accident.[6] The majority in the case before us adopts this same type of use restriction although the Supreme Court impliedly rejected it in *Byers*. The four-judge plurality opinion, authored by the Chief Justice, clearly found no necessity for such a restriction,[7] and Justice Harlan's concurrence indicated that a restriction was unwarranted as a condition to the statute's enforcement.[8] Therefore, I cannot conclude, as does the majority, that *Byers* dealt only with whether the accident report must be filed and not whether the information in the report may be used as evidence in a subsequent prosecution.

A close reading of *Byers* shows it to be quite similar to this case. Both statutes request information in a neutral manner, the furnishing of which may, in a specific case, provide incriminating answers.[9] In the present matter, Garner furnished answers indicating the source of much of his income from 1965 to 1967 was gambling. Having failed to assert the privilege at the proper time, if indeed it was applicable, he has waived it. *United States v.*

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[5]California Vehicle Code § 20002(a)(1) (1960). The statute has subsequently been amended. See California Vehicle Code § 20002 (West 1971).

[6]See *Byers v. Justice Court*, 71 Cal.2d 1039, 1050, 458 P.2d 465, 80 Cal.Rptr. 553 (1969).

[7]"We granted certiorari to assess the validity of the California Supreme Court's premise that *without a use restriction* § 20002(a)(1) would violate the privilege against compulsory self-incrimination. We conclude that there is no conflict between the statute and the privilege." 402 U.S. at 427 (emphasis supplied).

[8]"I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute." *Id.* at 458 (Harlan, J., concurring).

[9]To paraphrase Chief Justice Burger: Disclosure of the source of income is an essentially neutral act. Whatever the collateral consequences of disclosing the source of income, the statutory purpose is to implement the federal power to tax. *See* 402 U.S. at 432. *See also id.* at 430, 433-34.

*Sullivan*, 274 U.S. 259, 263-64 (1927); *Stillman v. United States*, 177 F.2d 607 (9th Cir. 1949).

I feel I am bound by the cases referred to above and must dissent. If, however, the case is to be retried, I suggest the trial court give more consideration to the foundational requirement for the introduction of *The Daily Racing Form*.

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